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No. 79-567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA,

Petitioner,

v.

EUGENE DiFRANCESCO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether respondent was properly determined to be "dangerous" as defined and required by 18 U.S.C. 3575.

2. Whether that portion of 18 U.S.C. 3576 which authorizes the government to appeal a sentence, where the defendant has not, is constitutional.

3. Whether 18 U.S.C. 3575 and 3576 are applicable to this respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1
TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 2
CITE TO OPINION BELOW 4
STATUTE AND RULES INVOLVED 4
STATEMENT OF THE CASE 4
SUMMARY OF ARGUMENT 6
ARGUMENT -
POINT I: RESPONDENT WAS NEVER PROPERLY DETERMINED TO BE "DANGEROUS" AS DEFINED AND REQUIRED BY 18 U.S.C. 3575 6
POINT II. THAT PORTION OF 18 U.S.C. 3576 WHICH AUTHORIZES THE GOVERNMENT TO APPEAL A SENTENCE, WHERE THE DEFENDANT HAS NOT, IS UNCONSTITUTIONAL 9
POINT III: 18 U.S.C. 3575 AND 3576 ARE NOT APPLICABLE TO THE RESPONDENT HEREIN 14
CONCLUSION 15

TABLE OF AUTHORITIES

Rule 32 (a) (1) Frederal Rules of Criminal Procedure 4
Baca v. U.S.,
383 F.2d 154 (10th Cir., 1967) 8
Hill v. U.S. ex rel. Wampler,
298 U.S. 460 (1936) 8

Johnson v. Mabry,
602 F.2d 167 (8th Cir., 1979)..... 8

North Carolina v. Pearce,
395 U.S. 711 (1969)..... 13

Scott v. United States,
434 F.2d 11 (5th Cir., 1970)..... 8

U.S. v. Batchelder,
442 U.S. 114 (1979)..... 14

U.S. v. Benz,
282 U.S. 304 (1931)..... 13

U.S. v. Biscoe,
518 F.2d 95 (1st Cir. 1975)..... 10

U.S. v. Core,
532 F.2d 40 (7th Cir., 1976)..... 9

U.S. v. Hayes,
589 F.2d 811 (5th Cir., 1979)..... 10

U.S. v. Jones,
487 F.2d 676 (9th Cir., 1973)..... 11

U.S. v. Marcello,
423 F.2d 93 (6th Cir., 1970)..... 10

U.S. v. Mason,
440 F.2d 1293 (10th Cir., 1971) 8

U.S. v. Murphy,
530 F.2d 1 (8th Cir., 1976)..... 9

U.S. v. Schipani,
435 F.2d 26 (2nd Cir., 1970) 11

U.S. v. Scijo,
537 F.2d 694 (2nd Cir., 1976) 10

United States v. Scott,
437 U.S. 82, 92 (1978)..... 13

United States v. Wilson,
420 U.S. 332 at 343 (1975)..... 14

Year-End Report On The Judiciary by Chief Justice
Warren E. Burger, Sept. 31, 1979..... 9

OPINION BELOW

The Court of Appeals' opinion is at 604 F.2d 769.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

They have been set forth in appellant's brief except Rule 32 (a) (1) of the Federal Rules of Criminal Procedure which provides as follows:

> "IMPOSITION OF SENTENCE. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court."

STATEMENT OF THE CASE

In March of 1975 respondent, Eugene DiFrancesco, was sentencted to 18 months imprisonment by Federal District Judge Harold P. Burke. On March 17, 1978, the respondent was sentenced in another matter to 9 years imprisonment by Federal District Judge George C. Pratt. The sentence by Judge Pratt was after the conviction herein involved but before the sentence herein involved was imposed. On April 28, 1978, the respondent was again sentenced by Judge Burke and is the sentence in issue here. Judge Burke sentenced him to 10 years imprisonment to run concurrent

with the 9 year sentence of Judge Pratt which had been imposed a little over one month previous. All sentences were imposed in Rochester, in the Western District of New York.

The government alone, not the respondent, sought review of Judge Burke's sentence on appeal pursuant to 18 U.S.C. 3576.

All three of the above sentences were for less than the maximum provided.

Prior to the sentencing herein the government brought proceedings on March 17, 1978, urging Judge Burke to find Eugene DiFrancesco a Special Dangerous Offender pursuant to 18 U.S.C. 3575 [P.A. 17]. Subsection (f) therein provides in pertinent part that "a defendant is dangerous for purposes of this Section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." [P.A. 4]. The underlying conviction herein was for two counts of violating 18 U.S.C. 1962 (c) & (d). Each count carried a 20 year maximum.

After the proceedings of March 17, 1978, the government submitted proposed Findings of Fact to Judge Burke. He adopted the proposed Findings on April 21, 1978, except for the last four lines of the finding portion which Judge Burke crossed out, namely, "and that confinement of the defendant for a period longer than that provided for violation of 18 U.S.C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant." [P.A. 43].

SUMMARY OF ARGUMENT

1. Eugene DiFrancesco was never determined to be a Special Dangerous Offender as defined and required by 18 U.S.C. 3575.

2. Not only is it unconstitutional for the government to appeal sentence where the defendant has not, but such a practice, where it might appear equitable on its face, would in reality greatly upset our present judicial system by interjecting a foreign concept and add a large burden to our appellate courts.

3. The section in issue here, namely, 18 U.S.C. 3576 is inapplicable because the sentencing judge could have imposed a sentence of over 25 years without it.

ARGUMENT

1.

THE DISTRICT JUDGE NEVER MADE A DETERMINATION, AS IS REQUIRED, THAT CONFINEMENT BE LONGER THAN PROVIDED FOR THE UNDERLYING FELONY.

18 U.S.C. 3575, which is necessarily involved herein, requires in Subsection (f) a determination that confinement for a period longer than that provided for the underlying felony is required. Here the underlying felony provided 20 years on each count. Judge Burke imposed a 10 year sentence. This is a clear indication that Judge Burke did not find "a period of confinement longer than that provided for such felony is required for the protection of the public", 18 U.S.C. 3575 (f).

The government's foundation is built on sand. An essential element of the section herein involved, namely, 18 U.S.C. 3576 is a determination of "dangerous" as defined in 18 U.S.C. 3575 (f). Such a determination was not made here. Eugene DiFrancesco was not properly determined to be a "Special Dangerous Offender". Therefore an appeal of his sentence by the government is improper even under the statute they seek herein to uphold, namely, 18 U.S.C. 3576.

Judge Burke stated, after the government had completed their presentation at the proceedings on March 17, 1978, in which the government had moved to have Eugene DiFrancesco declared a Special Dangerous Offender, that "About the only thing that's new here this morning that I have heard here is his birth certificate." [P.A. 31]. Judge Burke made that statement in cutting off Paul Shanahan's remarks on behalf of respondent, Eugene DiFrancesco, and, it is submitted, clearly indicated the Judge's frame of mind as not being overly impressed with the government's contentions. Clearly the Judge did not find that a period of confinement longer than that provided for such felony was required. In addition, Judge Burke struck that language from the government's proposed Findings of Fact that would have indicated such a determination, namely, he struck "and that confinement of the defendant for a period longer than that provided for violation of 18 U.S.C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant." [P.A. 43].

Judge Pratt in sentencing respondent, after the respondent had been convicted herein but before the sentence herein was imposed, also sentenced for less than the maximum. In other words, both Judges with all available information before them clearly determined that a period of confinement shorter than that provided by existing statutes was required.

If a proper finding of "Dangerous" is made as defined by 18 U.S.C. 3575 (f), then there will be no need for the government to appeal sentence as provided by 18 U.S.C. 3576, the statute under consideration here. The judge would necessarily have to have determined that "a period of confinement longer than that provided for such felony is required" 18 U.S.C. 3575 (f). In this case, either count of Eugene DiFrancesco's conviction provided for 20 year sentences. A longer period would be 25 years or fairly close thereto, at least in excess of 20 years. As noted below, Judge Burke was entitled, without benefit of 18 U.S.C. 3575, to impose a sentence of 40 years total on the two counts, 18 U.S.C. 1962 (c) & (d).

If any judge determines that a defendant is a Special Dangerous Offender as provided by 18 U.S.C. 3575, such a judge would also necessarily be inclined to impose a severe sentence. Therefore, the government's right to appeal under 18 U.S.C. 3576 is not needed.

If a conflict is determined to exist between the oral sentence pronounced by Judge Burke at sentencing and the determination of the respondent as a Special Dangerous Offender which it is submitted he acquiesced in, partially to placate the government, then it has been determined that the oral sentence pronounced constitutes the judgment and anything inconsistent is a nullity, *Hill v. U.S. ex rel. Wampler,* 298 U.S. 460, 464 & 465 [1936]; and *Johnson v. mabry,* 602 F.2d 167, 170 (8th Cir., 1979). A conflict between an oral sentence and a written sentence and commitment, the oral sentence governs, *U.S. v. Mason,* 440 F.2d 1293 (10th Cir., 1971); *Scott v. United States,* 434 F.2d 11 (5th Cir., 1970); and *Baca v. U.S.,* 383 F.2d 154 (10th Cir., 1967). The oral sentence pronounced by the sentencing judge, Judge Burke, was 10 years and it is

submitted anything inconsistent, i.e. determination of Special Dangerous Offender, is a nullity. That sentence was certainly shorter than that provided for the underlying felony, 18 U.S.C. 1962 (c) & (d) namely, 20 years.

POINT II

GOVERNMENT APPEAL OF SENTENCES IS UNCONSTITUTIONAL AND WOULD OVERBURDEN OUR APPELLATE COURTS

On its face, it may well appear equitable to permit the Government to appeal a sentence considered too lenient. However, it has been the practice in this Country by tradition, and by statute, that a defendant personally be afforded an opportunity to make a statement, right of allocation, at the time of imposition of sentence, Fed. Rules of Crim. Proc. 32(a) (1); *U.S. v. Core,* 532 F.2d 40 (7th Cir.-1976); and *U.S. v. Murphy,* 530 F.2d 1 (8th Cir.-1976).Incarcerated defendants, such as Eugene Di-Francesco, rarely, if ever, are allowed to personally appear before Appellate Courts, much less be afforded the opportunity to speak.

Our appellate courts continue to be overwhelmed with cases. It has been reported that there was a 7.8 percent overall increase in pending cases last year for the Courts of Appeals (Year-End Report On The Judiciary by Chief Justice Warren E. Burger, Sept. 31, 1979, p. 3). To burden the Courts of Appeals with sentencing consideration on application of the Government, would be to impose a large additional burden. In some sentencing situations a defendant may have many dozens of letters and other testaments

submitted on his behalf. Many of which might be handwirtten. To submit these along with the presentence report in such a manner as to be considered by Courts of Appeals would be a great additional administrative burden as well as a judicial one. Also to be considered is the premise that letters from different people, for example, politicians, business people, clergymen, etc., could have considerably different impact on the sentencing Judge because of his familiarity with the status and reputation of the person writing the letter, over and above what is contained in the letter. Appellate courts would not in many instances have this prospective.

District court judges have had wide discretion in determining sentence. Sentences are generally not questioned on appeal as long as they are within statutory limits and there is no showing of arbitrary or capricious action, *U.S. v. Hayes,* 589 F.2d 811 (5th Cir.-1979). A statement of reasons justifying the trial Judge's sentence is not mandatory, *U.S. v. Scijo,* 537 F.2d 694 (2d Cir.-1976).

A judge in imposing sentence can consider the defendant's conduct, for example, gestures and facial expressions made during the course of trial, in determining an appropriate sentence, *U.S. v. Biscoe,* 518 F.2d 95 (1st Cir., 1975). A trial judge is not confined to history of criminal convictions in determining an appropriate sentence. Activities of the defendant, including his relations to public and police authorities, his position in the community and other factors bearing on his life are relevent in determining punishment, deterence and rehabilitation, *U.S. v. Marcello,* 423 F.2d 93 (6th Cir., 1970).

A sentencing judge's access to information should be almost completely unfettered in order that he may acquire a thorough acquaintance with the character and history of the

man before him. This policy has been held to permit the broad acceptance of hearsay in the sentencing procedure, *U.S. v. Schipani,* 435 F.2d 26 (2nd Cir., 1970).

A trial court should have broad discretion as to what type of information to utilize in sentencing and it has been held not to be improper to use information not in the presentence report, *U.S. v. Jones,* 487 F.2d 676 (9th Cir., 1973).

In order for the Courts of Appeals to adequately pass on sentences, it would appear necessary for the sentencing judge to articulate as a matter of record in some fashion his reasons for the sentence he imposed. An appellate court would be in no position to pass judgment on the sentence below, if it did not have the reasons for the imposition of sentence available to consider. By forcing the sentencing judge to articulate as a matter of record his reasons for imposing sentence, a limitation of discretion would necessarily also be imposed. The present philosophy prevailing in our Federal system appears to be one encouraging the use of discretion and consideration of all aspects of a situation in imposing sentence. It is submitted, that many of the factors considered by a sentencing judge would be difficult to articulate for review by an appellate court.

In this case, Judge Burke well knew Eugene DiFrancesco. He had sentenced him on a previous occasion and was well aware of the situation prevailing the City of Rochester, New York. It is to be noted that in all the arsons alluded to by the government there were no physical injuries. In the one case involving physical injury, namely, the murder of Angello Massaro, the conviction of Eugene DiFrancesco and others was vacated and dismissed on motion of the District Attorney of Monroe County, New York, because of the perjured testimony of various law enforcement people. There have been indictments of those law enforcement

people because of that perjured testimony.

It is to be noted in passing that the petitioner's contention that respondent's counsel conceded the validity of the government's public records and offered no evidence is an attempt to place an erroneous impression before this Court. Mr. Shanahan, defense counsel below, objected to the certificate of conviction with regard to the murder because it was not only reversed but actually vacated and set aside [P.A. 29]. Further Mr. Shanahan cut short his presentation because Judge Burke interjected [P.A. 31] that "About the only thing that's new here this morning that I have heard here is his birth certificate.", clearly indicating that he was not overly impressed with the government's contentions. There is no question that Judge Burke was aware that the government was requesting a 25 year sentence [P.A. 31] and in consideration of all factors, one of which was Judge Burke's forty plus years of experience on the Federal bench in that community, chose to impose a sentence of 10 years. Judge George C. Pratt, of the Eastern District of New York, sitting in Rochester temporarily, sentenced Eugene DiFrancesco on March 17, 1978, to a total of nine years on a multi-count conviction. This was less than the maximum provided. That conviction and sentence by Judge Pratt was subsequent to the conviction herein, but before the sentencing by Judge Burke.

The government as appellant in this matter requested, for the first time in the history of the United States jurisprudence, that a Court of Appeals review and impose an increased sentence upon a criminal defendant who did not seek review of his sentence. It is our position that 18 U.S.C. 3576, which purports to give the government that right, is violative of the Fifth Amendment of the Constitution of the United States which provides that no person shall "be

subject for the same offense to be twice put in jeopardy of life or limb".

In *United States v. Benz,* 282 U.S. 304 (1931) this Court set forth the double jeopardy argument as follows:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> The argument seems to us irresistable, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." [Id at 282 U.S. 308].
>
> Quoting Ex Parte Lange, 85 U.S. (18 Wal.) 163 at 183 (1873).

One of the protections afforded by the guarantee against double jeopardy has often been said to consist of the protection against multiple punishments for the same offense, *North Carolina v. Pearce,* 395 U.S. 711 (1969). As noted below, this protects the individual against oppression by the government, embarrassment, expense and promotes integrity of final judgments, *United States v. Scott,* 437 U.S.

82, 92 (1978) and *United States v. Wilson,* 420 U.S. 332 at 343 (1975) wherein this Court stated:

> "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense."

Eugene DiFrancesco is presently serving the sentence imposed by Judge Burke in the Federal Prison at Atlanta, Georgia. He did not appeal his sentence to the Second Circuit Court of Appeals but rather argued in response to the government as appellant, that the sentence imposed below should not be disturbed.

POINT III

THE CONSTITUTIONALITY OF 18 U.S.C. 3576 SHOULD NOT BE PASSED ON HERE BECAUSE THAT STATUTE IS NOT APPLICABLE.

The Special Dangerous Offender Statute, 18 U.S.C. 3575, provides for sentences of up to 25 years. The respondent, Eugene DiFrancesco, could have received 20 years under Count I of his conviction, 18 U.S.C. 1962 (d), and an additional 20 years under Count II, 18 U.S.C. 1962 (c), for a total sentence of 40 years on the conviction herein involved. As Judge Haight stated in his concurring opinion below, "If the period of confinement provided for the felony by the underlying statute equals or exceeds twenty-five years, the dangerous special offender statute has no office to perform.", 604 F.2d 769 at 788. The constitutional issue should be avoided if possible. *U.S. v. Batchelder,* 442 U.S. 114 (1979).

CONCLUSION

The Writ of Certiorari granted in this matter should be withdrawn because the respondent was never properly determined to be a special dangerous offender as required by the statute in issue and further the statute is inapplicable in any event because of the sentences provided for the underlying conviction, or in the alternative the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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